

30 October 2019

EPA Victoria
GPO Box 4395
MELBOURNE VIC 3001

Attn: Dan Keely, Director of Policy and Regulation

Dear Dan

AEBN Submission to EPA Victoria on the proposed environment protection regulations (proposed regulations) and environment reference standards

The Australian Environment Business Network (AEBN) welcomes the opportunity to comment on the proposed changes to the Victorian environmental legislation.

The AEBN is a peak organisation representative body on environmental issues. AEBN Members consist of manufacturing and service industries, including local government. Membership consists of over 350 SMEs to multinational organisations from across Australia.

On 20 September 2019, the AEBN, in conjunction with Russell Kennedy Lawyers, had conducted an AEBN Seminar on new environmental laws and obligations that was supported by representatives of EPA Victoria and the Victorian Government Department of Environment, Land, Water and Planning. The Seminar was attended by approx. 100 representatives from industry and businesses from across Australia. In addition to the Seminar, the AEBN had liaised with numerous members and received direct feedback on a number of the questions that relate to the proposed Victorian environment protection regulations and environment reference standards. Accordingly, issues raised by AEBN Members are presented in this submission.

EPA Victoria's stated goal for the new regulations is to "maintain or reduce regulatory burden", and to "share the industrial waste obligations between producers and those authorised to receive industrial waste" – described as a "supply chain" model. As a general principle, AEBN supports these goals and looks forward to working closely with EPA Victoria, however, some specific areas, within the proposed changes, could be interpreted as being inconsistent with these goals.

Synopsis of issues raised by AEBN Members

Class 3 Substances/Indicators

Clause 112 (2) (b) of the proposed Regulations states:

“if it is not reasonably practicable to eliminate the generation of a Class 3 substances, reduce the generation of the Class 3 substances so far as reasonably practicable.”

Class 3 substances are highly hazardous materials and include extremely toxic substances and carcinogens.

Clause 20(1) of the current Air Quality Management SEPP states:

“Generators of emissions of Class 3 indicators must reduce those emissions to the maximum extent achievable.”

In the past, it has been the view of EPA that pollutants be reduced as far as reasonably practicable, however, these extremely hazardous materials must be reduced as much as possible. Is it the intent of EPA to reduce the requirements for these hazardous materials? If this is the case, our members are concerned that some industries may be subjected to more stringent requirements than some of their competitors. How will EPA ensure that a level playing field is maintained for all industries while ensuring the integrity of the new system is maintained?

Fee calculations

Schedule 11, Clause 2(5) states:

“In the case of an electricity generating power station that only operates during times of peak network load, the component fee is calculated using the following capacity factor formula—

(Total power generated in a financial year (MWh)) / (365 days x 24 hours x Installed capacity of the power station (MW))”

The above formula calculates the capacity factor for a power station, which is always less than 1, as a station does not generate at maximum load for a full year without stopping. For a peaking power plant, this capacity factor is likely to be in the 0.1 - 0.3 range. If the above Clause remains as is, then the fee payable by a peaking power station would be less than 1 fee unit per component emitted to atmosphere and does not take into consideration the quantity the licensee is licensed to emit.

Presumably, it was the intention to multiply the above capacity factor by the Annual load x Component rate, as calculated in Subclause 2 of the proposed Regulations, i.e. if the peaking station has a capacity factor of 0.1, then it would only pay 10% of the fee payable by a similar licensed base load station. However, this multiplication of the capacity factor by the component fee, as calculated in Subclause 2, is not stated in the proposed Regulation.

Class 1, 2 and 3 Substances

Schedule 4 lists the Class 1, 2 and 3 Substances, which are the same as the Class 1, 2 and 3 Indicators in the current Air Quality Management State Environment Protection Policy (AQMP SEPP). However, there are no ambient air quality criteria or limits set in the Environment Reference Standard (ERS) for each of the substances.

These limits (referred to as criteria in the current AQMP SEPP) are used to assess the results of plume dispersion modelling for new and current emission sources. Their absence means that a proponent does not have a limit they need to meet and an assessing EPA officer has no means of determining if the emissions will result in an unacceptable impact. Even if the emissions are reduced “as far as reasonably practicable” or “to the maximum extent achievable”, they may still be unacceptable due to the quantity of material being emitted, or the discharge conditions, such as low stack velocity or a stack which is not sufficiently tall to disperse the remaining substance down to “acceptable levels” (which is an unknown without limits).

There is an argument to review these limits, however, they should not be removed until new limits are ready to replace them.

Plume Dispersion Modelling

The proposed Regulations make no mention of plume dispersion modelling, when modelling should be carried out and how it should be assessed. Modelling of emissions to air is an essential tool to assess the ground level impact of emissions from sources. Without modelling, neither the proponent or EPA would know what the ground level impact of the proposal was going to be.

Failure to use plume dispersion modelling, set ground level concentration limits (even in the form of a guideline) and to not properly consider emissions from similar plants is concerning and may be problematic for the following reasons:

- The proponent may not be aware of a similar plant(s) elsewhere, or the plant(s) may not make their emission data available to the proponent;
- If there is a comparable plant, the circumstances are unlikely to be identical (emissions could be higher at the proposed plant(s) or the stacks could be in different locations affecting ground level concentrations or the residents may be closer, or the terrain at the proposed site may be different) - so how will the proponent and EPA assess if the stacks are sufficiently tall to disperse the residual contaminants and what is an acceptable ground level contaminant concentration?
- How do we know the existing plant we are comparing the proposal to has acceptable emissions? If the only contaminant is odour, then a subjective assessment is possible. However, if the contaminants have toxic properties, then how do we know the ground level concentrations at the existing plant are suitable if dispersion modelling is not required and ground level limits have not been set to assess the modelling results against?
- Local meteorology greatly affects how plumes disperse and the frequency of poor dispersion events. Therefore, simply comparing two plants at different locations may be an invalid assessment method. If the proposed site has poorer dispersion characteristics, then how would the proponent modify the design when dispersion modelling is not required and ground level concentration limits are absent?

In summary, the lack of dispersion modelling and ground level concentration limits will make it difficult for both the proponents and EPA to be sure that the proposal would not give rise to ground level concentration issues.

Will the onus be on industry to determine the appropriate time for the use of air quality monitoring or will EPA be providing guidance on the use of tools such as dispersion modelling?

Industrial Waste Management Policies

Due to the way the current waste regulations are drafted, Acid Sulphate Soil is not classified as a controlled waste and does not require waste transport certificates. However, it is controlled under the Industrial Waste Management Policy (Waste Acid Sulphate Soil), which is enacted under the current Environment Protection Act 1970 (current EP Act), and therefore, its disposal is managed through this mechanism. When the current EP Act is revoked, this policy will cease to exist and there does not appear to be any regulatory instrument to manage Acid Sulphate Soil in Victoria.

There are a number of other Industrial Waste Management Policies covering issues, such as - landfill siting and design, e-waste management, ozone depleting substances, used packaging and combustible recyclable and waste materials. Even though some of these topics are mentioned in the proposed Regulations, the level of detail and requirements are far less than what is provided in the individual policies.

Will these issues be addressed by EPA in Standards or guidance notes or will the onus be on industry to demonstrate there is no environmental harm on a case by case basis?

Definition of a Pollution Incident

The new *Environment Protection Amendment Act 2018* (the new EP Act) defines pollution as:

“pollution includes any emission, discharge, deposit, disturbance or escape of—

- (a) a solid, liquid or gas, or a combination of a solid, liquid or gas, including but not limited to smoke, dust, fumes or odour; or*
- (b) noise; or*
- (c) heat; or*
- (d) a thing prescribed for the purposes of this definition—*
but does not include a thing prescribed not to be pollution for the purposes of this definition;”

Therefore, “pollution” is the release of practically anything to the environment. This broad definition will have implications when it is applied to other aspects within the new EP Act, such as pollution incident.

The new EP Act then goes onto define a pollution incident as:

29 Meaning of pollution incident

A pollution incident means an incident or a set of circumstances—

- (a) that causes a leak, spill or other unintended or unauthorised deposit or escape of a substance; and*
- (b) as a result of which, pollution has occurred or is occurring—*
but does not include an incident or a set of circumstances that solely involves the emission of noise.

Therefore, a pollution incident is an unintentional release of anything (other than noise) that causes pollution, with pollution defined as a release of anything, i.e. a pollution incident is an unintentional release of anything (other than noise) that releases anything. This is a circular sentence that means every unintentional release of any material or heat is a “pollution incident”, irrespective of whether or not it has any impact on people or the environment.

The current EP Act defines pollution as a release that results in the loss of an actual or potential beneficial use that could be made of that segment of the environment. Therefore, it has a trigger (the loss of a beneficial use) that defines something as pollution, and therefore, requires a response by EPA and imparts some obligation and/or penalty on the polluter. The proposed set of definitions does not provide clarity as to what is or is not pollution or when EPA or generators of contaminants (particularly, operators that are not licensed by EPA) need to take action.

While AEBN understands that the definition of terms, such as ‘pollution’ need to be broad, it is important that the definition is not too broad so as to make it unworkable.

Industrial Wastes

There appears to be a number of anomalies in regards to the classification of many different wastes.

AEBN members have highlighted a number of these as they relate to their specific industries. While there was a broad representation from industry at the AEBN Seminar on 20 September 2019, the issues raised in this submission may not be an exhaustive list of the anomalies which exist.

Table 1 of the Draft Waste Classification Assessment Protocol classifies Putrescible/organic wastes that is pasteurised and meets EPA specifications (i.e compost or a pasteurised product) as an industrial waste. This classification appears to be at odds with EPA’s stated goal of reducing red tape and facilitating better environmental outcomes. If a material or waste is treated in such a way as to make it beneficial to the environment, then this practice should be encouraged, not restricted.

It is unclear why compost and pasteurised product that complies with EPA requirements is classified as an industrial waste, given the Victorian Government appears to be actively encouraging composting. It is also unclear why fill that is uncontaminated is also classified as an industrial waste. This results in several complications.

Additionally, an EPA representative at a recent AEBN Seminar on 20 September 2019 was asked during their presentation what should happen to “clean” fill material. The EPA representative responded with - as it is an Industrial Waste under the new Regulations, it should be disposed of at a landfill licensed to accept industrial wastes. Why valuable landfill space would be used to dispose of uncontaminated material again seems to be at odds with EPA’s stated goals.

Schedule 5 of the proposed EP Regulations classifies all fill material as an Industrial Waste. “*Excavated material or engineered fill including fill material, other than item 85 of this Table*” (Item 85 refers to contaminated soil).

Many of the wastes/potential feedstocks for the extractive industry are proposed to be pre-classified as not priority waste (e.g. concrete, bricks, rubble, asphalt, glass, plastics). On this basis, it is understood that these wastes will not require tracking, which simplifies the requirements for transporting and reporting of waste movements. This measure is supported by AEBN Members.

However, as per above, the need for permitting for waste and resource recovery (A13) may create a regulatory barrier to resource recovery and processing of non-priority (low risk) wastes. This coupled with the anomaly above regarding industrial waste definitions will make reuse of these inert materials problematic.

A strict reading of A13 may see some quarries requiring permitting from EPA for receipt and processing of concrete waste materials within their own businesses and/or receipt and processing of Construction and Demolition (C&D) waste which may be done ancillary to quarrying activities to supplement raw material feedstock. This requirement, if implemented, should be applied consistently so quarries are not targeted, while any company with a mobile crusher can setup without the same level of regulatory intervention. This requirement would appear to be inconsistent with the proposed deregulation of these wastes from tracking. Similarly, concrete batching plants may also require permitting from EPA for receipt and storage of concrete returns or consolidation of the concrete washout. This may promote activity that is contrary to the advice in the Concrete Batching Guidelines and the industry's general push towards a circular economy and product/waste stewardship - e.g.

- All excess-order concrete is returned to point of origin for reclamation or incorporated into future deliveries. Company policy and practice ensure concrete delivery contractors are not forced to dispose of excess concrete on construction sites or in landfill.

Reportable Priority Waste

Some AEBN Members' core business is to take their customers hazardous waste, blend it and transport it as an alternative fuel in cement kilns. Waste companies work closely with customers (waste generators) to ensure waste is transported with the correct paperwork and is coded correctly. The current system is quite confusing, and Members are concerned that the proposed new system with mirror codes will confuse the industry even further. It is complicating a system that is already complex.

In addition, the reporting requirements for waste into and out of Victoria is very unclear in relation to Waste Transport Certificates. A Member's customer has been instructed that waste transported into Victoria can be reported in the EPA electronic portal, but the guidelines state that the paperwork of the originating State must be used. Any regulations released in relation to reporting requirements need to be clear.

Whilst not all Members currently have full visibility of all the waste codes, or a complete understanding of the mirror codes, AEBN is concerned with the introduction of new terminology (i.e. priority waste) and mirror codes. As mentioned, many waste generators are already very confused. Many small to medium enterprises (SMEs) who do not necessarily understand the terminology *hazardous/non hazardous* and how to select between the two mirror codes, will struggle unless there are thorough guidance material produced to assist with the new system's application.

Financial Assurances

The requirement for financial assurance applies to A13b (Waste and resource recovery - medium) – which, as detailed, maybe applicable to some quarries for receipt and processing of concrete waste materials ancillary to quarrying activities to supplement raw material feedstock. These sites are likely to already have a financial security in the form of a rehabilitation bond held by the Victorian Government Department of Jobs, Precincts and Regions (DJPR). The requirement for a further financial security maybe an unfair commercial barrier for quarries and other extractive industries.

Declaration of Use

The new EP Act, section 3(1) (definitions) states:

“authorised to receive industrial waste, in relation to a person or a place or premises, means any of the following—...

(e) authorised by the regulations, or in accordance with a process prescribed by the regulations, to receive that type of industrial waste;”

Section 63 of the Draft Regulations states:

“63 Authorised to receive industrial waste

For the purposes of paragraph (e) of the definition of **authorised to receive industrial waste** in section 3(1) of the Act, a person, place or premises is authorised to receive a type of industrial waste—

(a) if there is a declaration of use in effect for that type of waste that applies to the person, place or premises;”

Section 64 of the Draft Regulations states:

“64 Declaration of use

(1) For the purposes of regulation 63(a), a declaration of use may be made in relation to industrial waste or priority waste, other than reportable priority waste for the purposes of section 143 of the Act, in accordance with this regulation by—

(a) in the case of a declaration of use made under subregulation (3)—the person in management or control of the place or premises at which the industrial waste is to be received;

(3) A declaration of use may be made in accordance with specifications acceptable to the Authority set out in a determination made under regulation 5 by the person in management or control of the place or premises at which the industrial waste is to be received.

(5) A declaration of use must—

(a) be in the form and manner approved by the Authority; and...”

Summarising the above requirements, if a person is to receive any industrial waste (unless specifically exempted or licensed to receive the specific waste), then they must apply for a Declaration of Use from EPA.

Given that compost is an Industrial Waste (along with manure – Code K220), then almost all market gardens and a significant number of Victorian farms will need to apply for a Declaration of Use. Additionally, as there is no lower limit on the amount of compost that requires a Declaration of Use, then EPA will need to supply Declaration of Use application forms for each bag of compost sold at retail garden supply outlets. Again, this approach seems to be inconsistent with EPA’s stated goal of reducing the regulatory burden.

The proposed EP Regulation also states:

“64 Declaration of use

(1) For the purposes of regulation 63(a), a declaration of use may be made in relation to industrial waste or priority waste, other than reportable priority waste for the purposes of section 143 of the Act, in accordance with this regulation by—

(a) ...

(b) in the case of a declaration of use made under subregulation (4)—

(i) the person who has the management or control of the industrial waste; and

(ii) the person in management or control of the place or premises at which the industrial waste is to be received...

(4) A declaration of use, other than a declaration made under subregulation (3), may only be made for, or in relation to, any of the following purposes—...

(c) treatment or containment of fill material on the site from which it was sourced;...

(e) storage of fill material sourced from another site for a period of no more than 60 days.”

Clause 64(4)(c) refers to “fill”, not contaminated fill or contaminated soil, therefore, it is unclear why anyone would need to treat clean fill material. It is also unclear whether “containment of fill” is the same as “storage of fill” referred to Clause 64(4) (e).

If the fill referred to in Clause 64(4)(c) is in fact clean fill, as it may appear to be, then it means that every construction site that digs a hole or trench and stockpiles soil onsite for later use will need to apply for a Declaration of Use. The same would apply to any offsite storage of soil on a second site. This occurs periodically on road construction projects, where the site is too small for topsoil stockpiles that will be used to rehabilitate the works area once construction is completed. Also, the 60 day period would be too short in these instances, as larger road projects can run from many months to years.

This application would presumably apply to inert refuse in quarrying, excess concrete returned for reuse and clean fill. The regulatory burden proposed, seems disproportionate to the risk and should be addressed.

The requirement for a waste producer to produce a “Declaration of Use” needs to be clarified. AEBN Members are uncertain as to the form such a declaration should take, under what circumstances it would be required, and where the burden of responsibility for its content will lay. This could deter waste producers from redirecting a waste stream to a beneficial use if they perceive that doing so imposes an additional administrative burden and/or a higher risk of regulator action. The regulations and/or guidance need to provide greater clarity as to when a ‘Declaration of Use’ should be prepared and by whom, and what form it should take, e.g. a form or template showing the type of information and level of detail expected by and acceptable to EPA.

Category D Waste

There is confusion regarding the new waste classifications and the requirements to track Category D Waste.

It is unclear if the new waste Category D is below the existing Category C, i.e. soils that are currently not classified will now become priority wastes, or if the existing classification levels for Prescribed Industrial Wastes (PIW) will be changed so that the least contaminated Category C soils will become Category D priority wastes. This needs to be clarified.

The presentation by EPA, at the AEBN Seminar on 20 September 2019, seemed to imply that soils meeting the classification as Fill Material will require tracking, which is not required at present. EPA needs to clarify what their expectations of waste generators will be, e.g. to record quantities and/or types of waste produced and the routes of disposal.

Conclusions

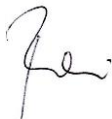
Clearly there is still considerable work to be undertaken in the generation of the new EP Act and supporting Regulations and other documentations. The shift in emphasis is not generally opposed by industry but further examination of the details is urgently needed. Issues raised in this submission should be addressed as soon as possible. Clarification around some of the definitions should also be addressed to allow these concerns to be debated and explored.

Transitional requirements, particularly around SEPPs and Standards should be considered to ensure important issues are not overlooked.

AEBN looks forward to working closely with EPA through this transformational period.

Should you require further detail or explanation regarding this submission, please do not hesitate to contact Tina Khoury, Australian Environment Business Network (AEBN) National Office at tina@aebn.com.au or 03 9397 2511.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Tina', with a stylized flourish at the end.

Tina Khoury
Chief Executive Officer
Australian Environment Business Network (AEBN)